

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-HC-2015-BR

UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
)	<u>ORDER</u>
v.)	
)	
JOHNNY ALLEN HASS,)	
)	
Respondent.)	

On 10 January 2007, petitioner United States of America (“the government”) initiated this proceeding seeking to have respondent Johnny Allen Hass (“Hass”) civilly committed as a sexually dangerous person under the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”), codified at 18 U.S.C. §§ 4247-4248. Pursuant to 18 U.S.C. § 4247(d), the court conducted an evidentiary hearing in this matter on 23 and 24 January 2012.

I. BACKGROUND

Hass was 43 years old at the time of the evidentiary hearing. When Hass was 13 years old, he suffered a serious traumatic brain injury, which was caused by a bicycle accident. (Gov’t Exs. 29 at 5; 30 at 10.)¹ His first conviction for a sexual offense involved conduct that occurred on or about 19 April 1982. (Gov’t Ex. 30 at 6.) At the time of that incident, Hass was 14 years old, and the victim was a 9-year-old female. (Gov’t Exs. 29 at 8; 30 at 6.) Hass testified at the evidentiary hearing that he saw the victim as he was walking home from school, asked her to

¹ In relaying the background information in this case, the court cites mainly to the facts presented by the government, as the government bears the burden of proof in this proceeding. The court will note any factual disputes that exist between the parties.

“play house,” physically took her into an empty apartment, removed her clothing, and attempted to engage in vaginal intercourse with her against her will. He subsequently pled guilty to attempted sexual battery. Hass was adjudicated as an adult in Florida but was sentenced to a juvenile detention facility. He served approximately three years in custody. (Gov’t Exs. 29 at 8-9; 30 at 6; see also Resp.’s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 4 ¶ 15.)

Hass’s next sexual offense occurred on or about 21 December 1986, when Hass was 18 years old. (Gov’t Exs. 29 at 9; 30 at 4-5.) The victim was a 5-year-old girl. (Id.) Hass was at the victim’s home watching television with the victim and her brother. (Gov’t Ex. 30 at 5.) Hass began fondling the victim’s vagina under her clothes. (Gov’t Exs. 29 at 9; 30 at 5.) Later, the victim went into her brother’s bedroom. (Gov’t Ex. 30 at 5.) Hass followed her, laid on top of her, told her he loved her, kissed her and began fondling her. (Gov’t Ex. 29 at 9; 30 at 5.) His actions were interrupted when the victim’s brother walked into the room.² (Id.)

Hass was subsequently arrested and released on bond. While out on bond, on or about 10 July 1987, he brandished a short-barreled gun, later determined to be either a CO2 pistol or a BB pistol,³ at his former girlfriend and threatened to kill her unless she agreed to have sex with him. (Id.) She convinced him to let her go by telling him that she would meet him later for sex. (Id.)

² At the evidentiary hearing, Hass testified that he was at the victim’s home on the date in question and that the child was sitting in his lap watching television. However, he denied molesting the child. He stated that he subsequently pled no contest to the charge that was brought against him because it would have been his word against the word of the victim and her family. (See also Resp. Ex. 1 at 22.)

³ Although the reports submitted by the government’s experts in this case indicate that the gun was a CO2 pistol (Gov’t Exs. 29 at 9; 30 at 5), Hass testified at the evidentiary hearing that the gun was actually a BB pistol (see also Resp. Ex. 1 at 22).

She reported the incident to the police, and Hass was arrested.⁴ (Id.)

On 4 November 1987, Hass was convicted of attempted lewd assault upon a child in relation to the 21 December 1986 offense, and he was also convicted of aggravated assault in relation to the 10 July 1987 offense. (Id.; see also Gov't Exs. 6-7.) He was sentenced to thirteen months imprisonment on each charge, with the sentences to run concurrently. (Id.; see also Resp.'s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 4 ¶ 16.)

In 1994, Hass was investigated by Child Protective Services because it was suspected that he had physically abused [REDACTED]. (Gov't Ex. 9.) As a result of the investigation, Hass and his wife voluntarily relinquished custody of [REDACTED] to the child's maternal grandparents. (Id.) Hass was limited to supervised visitation with [REDACTED] and was ordered to obtain a psychological evaluation and to follow through with any counseling suggested by the evaluator. (Id.)

On or about 5 May 1995, Hass sent ten photographs over the internet to an undercover federal agent. (Gov't Exs. 11 at 3 ¶ 3; 30 at 6.) Nine of the ten photographs consisted of child pornography. (Id.) As a result of the investigation, a search was conducted of Hass's home and computer, and additional images of child pornography were found. (Gov't Exs. 11 at 3 ¶ 4; 30 at 7.) Hass subsequently pled guilty to the charge of interstate transportation of child pornography via computer in the United States District Court for the Western District of North Carolina and was sentenced to 26 months imprisonment. (Gov't Exs. 13; 29 at 9; 30 at 6.) Hass's three-year term of supervised release began on or about 26 September 1997. (Gov't Proposed Findings of Fact and Conclusions of Law, DE # 74, at 5 ¶ 14; Resp.'s Proposed Findings of Fact and

⁴ At the evidentiary hearing, Hass testified that although his former girlfriend did not want to have sex with him on the date in question, he did not threaten her or assault her in any way. (See also Resp. Ex. 1 at 22.)

Conclusions of Law, DE # 75, at 4 ¶ 17.)

On 24 July 1998, Hass's supervised release was revoked, and he was sentenced to twenty-four months imprisonment. (Gov't Ex. 33 at 001682, 7/24/98 & 9/8/98 docket entries.) However, the available records do not clearly indicate the exact factual findings that were made in support of the revocation. (Id., 7/24/98 docket entry; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 74, at 6 ¶ 16.) At a minimum, it appears that Hass engaged in unsupervised contact with [REDACTED], had unauthorized contact with other minors, and possessed child pornography. (Resp.'s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 4 ¶ 18.) It was alleged that Hass had molested an 8-year-old girl (Gov't Ex. 33 at 001667), but Hass denied this allegation at the time that his supervised release was revoked (id. at 001682, 7/24/98 docket entry; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 74, at 6 ¶ 16) and at the instant evidentiary hearing.

On 8 September 1998, Hass was convicted of sexual exploitation of minors in the United States District Court for the Western District of North Carolina. (Gov't Exs. 15; 30 at 7.) The charge related to Hass's possession of child pornography while on supervised release in late 1997. (Gov't Exs. 29 at 9; 30 at 7; Resp.'s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 5-6 ¶ 19.) Hass was sentenced to eighty-five months imprisonment to be followed by five years of supervised release. (Id.; see also Gov't Ex. 15.) He began his term of supervised release on 30 December 2004. (Gov't Ex. 30 at 8; Gov't Proposed Findings of Fact and Conclusions of Law, DE # 74, at 7 ¶ 20; Resp.'s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 6 ¶ 19.)

In January 2006, a United States probation officer petitioned for revocation of Hass's

supervised release. (Gov't Exs. 23-24.) The grounds for revocation were that Hass had failed to take a polygraph as ordered, had possessed child pornography, had used a computer which had the capacity to be connected to a computer network without the approval of his probation officer, and had removed his GPS tracking unit, thrown it away, and left the area without permission. (Id.; see also Gov't Ex. 30 at 8.) On or about 16 February 2006, Hass's supervised release was revoked when he admitted to four of the probation violations. (Gov't Exs. 25; 30 at 8.) He was sentenced to twelve months imprisonment to be followed by four years of supervised release. (Id.) On 10 January 2007, the government certified that Hass was a sexually dangerous person pursuant to 18 U.S.C. § 4248. (DE # 1.)

While in the custody of the Bureau of Prisons, Hass was investigated for conspiring with his ex-wife and another inmate to allow [REDACTED] to be molested for the sexual gratification of the other inmate. (Gov't Exs. 29 at 10-11; 30 at 15-16.) Hass has denied participating in the conspiracy, and his participation in the matter was never proven. (Id.) At the evidentiary hearing, Hass did admit that he facilitated communication between his ex-wife and the other inmate, but that he did so because it was his understanding that the other inmate wanted assistance with obtaining religious materials from the internet.

While in prison, Hass was also investigated for conspiring with other inmates to plan a criminal enterprise called "Club Ped," a commune that would engage in child sexual slavery. (Gov't Exs. 29 at 11-12; 30 at 20.) Hass's participation in this conspiracy was never proven. (Id.) At the evidentiary hearing, Hass denied involvement in "Club Ped" but did admit to a different plan he called "The Farm." He described "The Farm" as a place where pedophiles like himself, as well as other convicted felons, could live together and support each other. (See also

Gov't Exs. 29 at 11-12; 30 at 25.)

While Hass was being housed in Butner, North Carolina awaiting a hearing in this matter, materials were confiscated from his cell in the Maryland Unit. These materials included photos of scantily clad or nude adult females, at least one photo of three prepubescent minor females in bathing suits, dancewear catalogues depicting both adult and prepubescent females in leotards, and a notebook in Hass's handwriting containing indications that Hass had an intention to obtain more child pornography if released into the community. (Gov't Exs. 28; 29 at 11; 30 at 21-22; 32.) At the evidentiary hearing, Hass testified that all of the materials, with the exception of the notebook, belonged to his cell mate. Although Hass admitted to looking at the confiscated photos and catalogues, he denied that they were ever in his possession.

II. DISCUSSION

The Adam Walsh Act provides for the civil commitment of "sexually dangerous person[s]." 18 U.S.C. § 4248. Under 18 U.S.C. § 4247(a)(5), a "sexually dangerous person" is one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." A person is "sexually dangerous to others" if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6).

Under the Adam Walsh Act, the government has the burden of proving that Hass is sexually dangerous by clear and convincing evidence. 18 U.S.C. § 4248(d). "The clear and convincing evidence standard is an 'intermediate standard,' lying somewhere 'between preponderance of the evidence and proof beyond a reasonable doubt.'" United States v. Hunt,

643 F. Supp. 2d 161, 179 (D. Mass. 2009) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)). The government must produce “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” Id. (alteration in original) (quoting Black’s Law Dictionary 596 (8th ed. 2004)).

Thus, in order to prove that Hass is a “sexually dangerous person,” the government must prove three elements by clear and convincing evidence: (1) that Hass engaged in or attempted to engage in sexually violent conduct or child molestation; (2) that Hass suffers from a serious mental illness, abnormality, or disorder; and (3) that, as a result of the serious mental illness, abnormality, or disorder, Hass would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released. See 18 U.S.C. § 4247(a)(5)-(6); 18 U.S.C. § 4248.

Three experts testified at the evidentiary hearing. Dr. Lela Demby and Dr. Christopher North⁵ testified on behalf of the government. Dr. John Fabian, who was selected as an additional examiner pursuant to 18 U.S.C. § 4247(b) (see DE # 47), testified on behalf of Hass. The only other witnesses who testified were Hass, who was called as a witness during the government’s case-in-chief, and Angela Rheault, Hass’s mother, who testified on behalf of Hass.

A. Past Violent Sexual Conduct or Child Molestation

The court finds that the first criterion for commitment under the Adam Walsh Act, that Hass has “engaged or attempted to engage in sexually violent conduct or child molestation” in the past, is satisfied. 18 U.S.C. § 4247(a)(5). The experts in this case all agree that Hass has committed acts of sexually violent conduct or child molestation (see Gov’t Exs. 29 at 8-10; 30 at

⁵ Dr. North provided his testimony via video conference technology from the United States District Court for the Central District of California, Riverside Courthouse.

4-5; Resp. Ex. 1 at 20-22), and Hass does not dispute that the government has proven the first element by clear and convincing evidence (Resp.’s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 9 ¶ 35).

B. Serious Mental Illness, Abnormality, or Disorder

To meet its burden of establishing that Hass is “sexually dangerous to others,” the government must also prove that Hass “suffers from a serious mental illness, abnormality, or disorder.” 18 U.S.C. § 4247(a)(6). Although the experts in this case disagree somewhat regarding Hass’s exact diagnosis,⁶ all three experts agree that Hass suffers from some type of pedophilia and that pedophilia is a serious mental disorder. Furthermore, Hass admitted at the evidentiary hearing that he considers himself to be a pedophile, and he does not dispute that the government has proven this element. (Resp.’s Proposed Findings of Fact and Conclusions of Law, DE # 75, at 9 ¶ 36.) Accordingly, the court concludes that the government has proven by clear and convincing evidence that Hass currently suffers from pedophilia, which is a serious mental illness, abnormality, or disorder.

C. Serious Difficulty Refraining

The real point of dispute in this case involves the third element under the Adam Walsh Act, *i.e.*, whether the government has proven, by clear and convincing evidence, that Hass, if released, “would have serious difficulty in refraining from sexually violent conduct or child molestation” as a result of his serious mental illness, abnormality, or disorder. 18 U.S.C. §

⁶ The experts disagree with respect to the details of the pedophilia diagnosis. Drs. North and Fabian opine that Hass is sexually attracted to females (Gov’t Ex. 30 at 24-26; Resp. Ex. 1 at 37, 40), while Dr. Demby opines that Hass is sexually attracted to both females and males (Gov’t Ex. 29 at 12-14). There is also disagreement with respect to other aspects of Hass’s diagnosis. For example, Drs. North and Fabian defer an Axis II diagnosis (Gov’t Ex. 30 at 24, 26; Resp. Ex. 1 at 37, 40), while Dr. Demby provides an Axis II diagnosis of Antisocial Personality Disorder (Gov’t Ex. 29 at 12, 14). All three experts agree with respect to an Axis III diagnosis of traumatic brain injury and seizure disorder. (Gov’t Exs. 29 at 12; 30 at 24; Resp. Ex. 1 at 37, 40.)

4247(a)(6). The determination under this prong requires the court to consider Hass's volitional control over his actions understood in relation to his mental condition, and it is also informed by the constitutional constraints on the civil commitment scheme. In Kansas v. Crane, 534 U.S. 407 (2002), the United States Supreme Court held that in order to civilly commit someone for sexual dangerousness, "there must be proof of serious difficulty in controlling behavior." Id. at 413. The Supreme Court noted that this standard allows courts wide discretion in relying on a number of different factors relevant to sexual dangerousness. The standard does not have "a particularly narrow or technical meaning;" nor is it demonstrable with "mathematical precision." Id.

As a result, the court does not construe this criterion for commitment to require proof of any statistical probability of reoffense. The Adam Walsh Act does not ask the finder of fact to determine exactly how likely the respondent is to reoffend, but whether he will have "serious difficulty" in refraining from doing so. Recidivism rates are circumstantially relevant to the serious difficulty inquiry because offenders who continually expose themselves to punishment may be presumed to have the most difficulty refraining from sexual reoffending. But the ultimate question called for by the Adam Walsh Act concerns the self-control of an individual, not the statistical re-arrest patterns of a given population. Thus, the court considers the recidivism rates associated with Hass's actuarial scores,⁷ but affords them less weight than

⁷ Dr. Demby gave Hass a score of 6 on the Static 99-R actuarial instrument. She testified that offenders from a preselected high risk and needs sample with the same score as Hass have been found to sexually reoffend at a rate of 31% within five years and 42% within ten years. (Gov't Ex. 29 at 16.) Dr. Demby also gave Hass a score of 30 on the Hare Psychopathy Checklist – Revised, Second Edition ("PCL-R"), which is the cutoff score indicated for psychopathy. (Id. at 17-18.)

Dr. North testified that he used several actuarial instruments to assist him in determining whether Hass meets the criteria for commitment. Dr. North gave Hass a score of 7 on the Static 99-R actuarial instrument, a 10 on the Static 2002-R, and a 10 on the Minnesota Sex Offender Screening Tool-Revised. All three scores place Hass within the highest risk category for being charged with or convicted of a sexual offense. (Gov't Ex. 30 at 38.)

Similar to Dr. North, Dr. Fabian gave Hass a score of 7 on the Static 99-R and a score of 10 on the Static

(continued...)

Hass's past and current conduct, and the testimony of the experts as a whole.

Here, both Dr. Demby and Dr. North testified that, in their opinions, Hass would have serious difficulty in refraining from sexually violent conduct or child molestation if released. In contrast, Dr. Fabian opined that Hass would not have serious difficulty in refraining from sexually violent conduct or child molestation. Although Dr. North has acknowledged that it is true that Hass's "last two convictions have involved 'hands off' offenses (collection of child pornography)," he believes that Hass's "sexual and general self-regulation are so poor that he would be likely to molest a female child if the opportunity arose." (Gov't Ex. 30 at 43.) In addition, both Dr. North and Dr. Demby testified at the evidentiary hearing that Hass's impulsivity, his thrill-seeking and risk-taking behaviors, and his past inability to comply with the terms of supervision indicate a high risk of future sexual reoffense.

The court agrees that Hass has acted impulsively in the past, that he has engaged in thrill-seeking and risk-taking behaviors, and that he has had difficulty in complying with the provisions of his supervised release. For example, while under the supervision of the United States Probation Office for the Western District of North Carolina in 2006, Hass removed his GPS tracking unit, threw it away, and left the area without permission. However, the fact that Hass has made various poor choices, some of which have been unlawful, does not demonstrate the lack of control necessary to justify a civil commitment based on sexual dangerousness. Ultimately, Hass's volitional control must be "viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself" in such a

⁷(...continued)
2002-R. (Resp. Ex. 1 at 43, 49-50.) Dr. Fabian also gave Hass a score of 22 on the PCL-R, which places him in the moderate descriptor category of psychopathy. (*Id.* at 52.)

way that distinguishes Hass “from the dangerous but typical recidivist convicted in an ordinary criminal case.” Crane, 534 U.S. at 413. Here, the evidence introduced by the government fails to rise to the degree necessary to distinguish Hass from the ordinary dangerous recidivist.⁸

The court credits the testimony of Dr. Fabian with regard to the issue of whether Hass will have serious difficulty in refraining from sexually violent conduct or child molestation if released. Dr. Fabian is both a forensic psychologist and a clinical neuropsychologist, and he was the only expert who conducted a neuropsychological evaluation of Hass. Dr. Fabian analyzed Hass’s current neurocognitive functioning and the effects, if any, that his traumatic brain injury at age 13 had on his sex offending. In addition to diagnosing Hass with pedophilia, Dr. Fabian found that Hass meets the qualifications for a diagnosis of a cognitive disorder not otherwise specified and Attention Defecit Hyperactivity Disorder (“ADHD”) by history. (Resp. Ex. 1 at 37, 42.) He also determined that Hass’s neuropsychological functioning is not currently impaired in the areas of executive functioning and decision making. (Id. at 58.) Dr. Fabian concluded:

It is my opinion that [Hass’s] neurocognitive disorders of traumatic brain injury and ADHD, coupled together within a developing brain, placed him at risk for behavioral impairments, impulsivity, and sexual aggression during his adolescent and young adult years. The behavioral, emotional, and neurocognitive effect of these conditions has diminished over time, and do not cause him significant volitional impairments more recently and currently. . . . His pedophilic condition is more associated with his more recent non-contact and non-violent sexual offending, and in my opinion does not cause him serious difficulty in refraining from sexually violent conduct or child molestation if released. Mr. Hass has gone years without a sexually violent offense towards a child. It is also my opinion that Mr. Hass’ risk of possession of child pornography is more significant than his

⁸ Furthermore, the court notes that there was a 7-year period from approximately 1988 to 1995 where Hass lived in the community without incurring any criminal charges of a sexual nature. This demonstrates that Hass is capable of exercising significant control over his behavior.

risk of contact sexually violent offending.

(Id.)

The court agrees with the reasoning of Dr. Fabian and notes that Hass committed his first violent sex offense within a year of his traumatic brain injury. However, Hass has not been convicted of a “hands on” sex offense in approximately twenty-five years. As Dr. Fabian has observed, Hass’s more recent crimes have involved the possession of child pornography, which is a non-contact, non-violent offense. Although the court recognizes that Hass may possess child pornography in the future, the possibility of such conduct is simply insufficient to commit him under the Adam Walsh Act. Pursuant to 18 U.S.C. § 4247(a)(6), the government must prove by clear and convincing evidence that Hass “would have serious difficulty in refraining from sexually violent conduct or child molestation if released” (emphasis added). Here, the government has failed to show that Hass’s possession of child pornography would lead him to commit a “hands on” sex offense in the future.⁹

Furthermore, the court finds that Hass has experienced some growth in the years that he has been detained pursuant to the Adam Walsh Act. Hass testified at the evidentiary hearing that he would not have complied with the conditions of supervised release five years ago. However, he stated that he has engaged in significant self-analysis while he has been civilly detained. Hass

⁹ At the evidentiary hearing, Dr. Fabian testified that there is not much research available relevant to offenders with a history of both child molestation and child pornography possession. However, he did cite to a study in which it was found that child pornography offenders who committed a prior or concurrent contact sex offense reoffended by committing either a violent offense or a contact sexual offense at the low rate of approximately 9% over 29.7 months. See Michael C. Seto & Angela W. Eke, “The Criminal Histories and Later Offending of Child Pornography Offenders,” 17(2) Sexual Abuse: A Journal of Research and Treatment 201, 207 (2005). As previously mentioned, the court does not require proof of any statistical probability of reoffense in order to commit an individual pursuant to the Adam Walsh Act. However, this study does support the finding that it is unlikely that the possession of pornographic material would somehow fuel a future “hands-on” sex offense by Hass. (See also Resp. Ex. 1 at 54.)

admitted at the evidentiary hearing that he has a problem with child pornography, that he knows he needs to control his fantasies, and that he wants to receive treatment if he is released. He also stated that reviewing the discovery in this matter and seeing his actions “on paper” helped him to better understand what he had done in the past. Thus, Hass’s insight into his behavior should reduce his risk of reoffense.

At the evidentiary hearing, the government argued that if Hass is not civilly committed as a sexually dangerous person, he will be incarcerated if he reoffends in the future. On the other hand, if Hass is civilly committed pursuant to the Adam Walsh Act and then reoffends while on conditional release, he will receive treatment as opposed to imprisonment. The government contends that the latter scenario would be best for Hass. While the court does not disagree with the government with respect to this point, the fact that Hass might be better off receiving treatment if he reoffends does not relieve the government of meeting its burden of proof under the Adam Walsh Act. The government has failed to meet that burden in this case.

The court realizes that it is possible that Hass may commit an act of sexual violence or child molestation in the future. “However, in the absence of clear and convincing proof that a serious mental impairment causes an individual to have serious difficulty in controlling his behavior, the constitution requires reliance on the criminal law, rather than a civil commitment, to deal with that risk.” United States v. Wilkinson, 646 F. Supp. 2d 194, 209 (D. Mass. 2009). As the government has not presented such clear and convincing proof, Hass may not be civilly committed.

III. CONCLUSION

For the foregoing reasons, the government has failed to show by clear and convincing

evidence that Hass suffers from a serious mental illness, abnormality, or disorder, as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released. Accordingly, the court concludes that Hass is not a sexually dangerous person under the Adam Walsh Act and ORDERS that the government release Hass forthwith to the custody and supervision of the appropriate United States Probation Officer. The Clerk is DIRECTED to close this case.

This 15 February 2012.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is positioned above a horizontal line.

W. Earl Britt
Senior U.S. District Judge